No. 17310

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, a corporation d/b/a SOUTH BAY DAILY BREEZE,

Respondent.

Brief for Respondent Southern California Associated Newspapers, a Corporation d/b/a South Bay Daily Breeze.

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Statement of the Case.

Preliminary Statement.

The Trial Examiner of the National Labor Relations Board issued his Intermediate Report in the above-entitled matter finding that Respondent, Southern California Associated Newspapers, a corporation d/b/a South Bay Daily Breeze, had not engaged in any unfair labor practices in connection with its relations with one of its employees, David Clark, the charging party, and recommending that the complaint be dismissed in its entirety. [R. 8, 19.] The Board issued its Decision and Order concluding that Respondent had violated Sections 8(a)(1) and (3) of the Na-

tional Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sections 151 *et seq.* (hereinafter referred to as "Act"). In its Decision the Board adopted the evidentiary findings of the Trial Examiner. [R. 20.] The Board did not adopt the Trial Examiner's conclusions or recommendations inconsistent with its decision that Respondent had violated Sections 8(a)(1) and (3) of the Act. [R. 20.]

Respondent controverts the statement of the case submitted by the Board in its brief because it does not fully state the facts as found by the Trial Examiner and adopted by the Board, and because it attempts to change the facts as found by the Trial Examiner and adopted by the Board. For that reason Respondent will, in its statement of facts, present additional facts not referred to in the brief of the Board, which facts were relied upon by the Trial Examiner in recommending that the complaint be dismissed, were adopted by the Board in its Decision, and are hence binding on the Board in the instant case.

Statement of Facts.

Respondent is engaged in the business of publishing and selling newspapers, including a daily newspaper called South Bay Daily Breeze, which is published in Redondo Beach, California, and which is circulated in the beach communities immediately surrounding Redondo Beach.* [R. 8.] David Clark was first

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*Respondent also publishes and sells other newspapers. However, only the business of publishing and selling the South Bay Daily Breeze is involved in the instant case. All references to Respondent shall be deemed to be references only to Respondent's activities in connection with publishing and selling the South Bay Daily Breeze.

associated with Respondent as a newspaper carrier. [R. 9.] Commencing in 1958 and continuing until December 21, 1959 David was an employee assigned to the circulation department. His duties, which consisted of taking the newspapers from the conveyor leading from the press and of preparing mailing wrappers, required him to spend most of his time in the mailroom. [R. 9.] The Respondent did not have a separate mailing department. The mailroom was under the supervision of Howard Collins, the circulation manager. [R. 9.] The jobs of stacking and tying the papers, of addressing wrappers and of carrying and loading the papers were performed in the mailroom by seven employees of the circulation department who were classified as district managers. [R. 66-67; 232-233; 236-237.] These were the only full time mailroom employees.* [R. 17; 236-237; Respondent's Ex. 5, R. 331.] In newspapers where the mailroom employees are represented by Mailers' Union Local 9, International Typographical Union,** this work is performed by members of the Union. [R. 10.] In addition to their mailroom duties, the district managers also were in charge of the newspaper carriers. [R. 10.] Prior to December 19, 1959 David's rate of pay was $1.50 per hour and he was required to work long hours on Saturdays. [R. 9.]

While David was a newspaper carrier, Howard Collins, Respondent's circulation manager, became interested in him and was instrumental in obtaining David a

*David was classified as a part time employee but worked approximately 40 hours per week. [R. 68.]

**The Union involved in the instant case is Mailer's Union Local 9, International Typographical Union AFL-CIO, hereinafter referred to as "Union."

job as a fly boy. [R. 9.] David and Collins were good friends, as well as Collins and David's father, Bernard Clark. [R. 9.] A topic of frequent conversation among all three was the best way in which David could enhance his prospects for a career by attending school. [R. 9.] On many occasions, at Bernard Clark's request, Collins urged David to complete his education. [R. 9.]

Bernard Clark was dissatisfied with David's rate of pay and with the long hours that he worked on Saturdays and felt that David should work less hours and have more money for each hour worked. [R. 10.] Bernard Clark discussed this with Collins on many occasions. [R. 142-143.] Bernard Clark was aware of the fact that Union mailers in downtown Los Angeles were earning in excess of $3.00 per hour [R. 10.] On or about November 1, 1959 Bernard Clark, who was a member of a printer's local of the International Typographical Union, approached an official of the Union. As a result of this an organizer for the Union came to Clark's residence on December 15, 1959 and initiated David into the Union as a journeyman. [R. 10.] The organizer told David that if he was terminated by the Company through no fault of his own the Union would get him another part time job in downtown Los Angeles where Union mailers were receiving in excess of $3.00 per hour. [R. 11.]

On or about December 15, 1959 Collins obtained authorization from Mr. Curry, the publisher, to institute a trainee program for the circulation department. The institution of a trainee program had been considered for some time in order that there would be avail-

able an extra employee who was familiar with all of the duties of the circulation department employees and who would be able to either permanently or temporarily fill in when one of them quit or was unavailable. It was decided that the first step in the trainee program would be the job of fly boy and the second step would be the position of trainee district manager. It was decided that David should be the trainee district manager because he knew the fly boy job and the mailroom procedures and because it was the kind of position which he had been trying to obtain.

On December 19, 1959 Collins offered David the position as a trainee district manager which would pay him $1.67 an hour and which would permit him to work less hours on Saturdays. [R. 12.] As a trainee he would be required to learn to perform all of the duties of the district managers, both inside and outside of the mailroom, including stacking, tying, addressing wrappers, carrying and loading papers and supervising newspaper carriers. This raise in pay and shorter hours had been an objective of the Clarks for several months. [R. 12.] The trainee position offered to David was a better position than the fly boy job with increased pay and it was the type of position David and his father had been trying to obtain for David with Respondent. [R. 15.] During this conversation David stated that he didn't know whether or not he could take the position and that he wanted to talk to his father about it. [R. 43-44.] Collins stated that because of the fact that he wanted to start the trainee program and build a series of trainees and because of the fact that the first step in the program was the job of fly boy, if David didn't

take the position as trainee he would have to hire another trainee in his place and start the new man in the fly boy job. [R. 44.] Collins stated that he hoped that David would take the job. [R. 284.]

On December 21, 1959 Collins again asked him to take the trainee position and David stated that he would not, whereupon David left Respondent's employ. [R. 85.] Both David and Bernard Clark testified that David told Collins on December 19 and 21 that David could not take the new job because the new job would increase his expenses for car insurance and gasoline. [R. 12.] The Trial Examiner did not credit such testimony. He found as a fact that David told Collins that David would not take the new job because he could obtain a job in Los Angeles as a mailer where he could work two shifts a week with many less hours and make more money than he could at the Daily Breeze. [R. 13, 14.] The Trial Examiner further found as a fact that David did not accept the new job which was a better one and for more pay and which was a type of job which David had been trying to obtain with Respondent because of the Union's assurance that if he lost his job through no fault of his own he could get a couple of nights' work a week at double the hourly rate he was getting from Respondent. [R. 16.] The Trial Examiner further found that the objection with respect to the increased automobile expenses was invented to convince the Union he was being given a worse job because he had joined the Union. [R. 16.] The

Trial Examiner further found that although the position Collins offered David was substantially better and of the type he and his father had been trying to obtain for some months, the prospects of getting two nights' work at double the pay seemed more attractive and "David *declined* the job offered by Collins." [R. 17.] (Emphasis added.)

The Trial Examiner found as facts that in David's new job as a trainee he would still have been performing work within the jurisdiction of the Mailers' Union; that he could have remained a member of the Union, and if the Union so desired it could have attempted to represent him in collective bargaining. [R. 14-15; 18.] These findings were adopted by the Board. These findings were based upon undisputed evidence that David's duties as a trainee would have consisted of stacking, folding, counting of papers, tying by hand, delivering papers to mailers, carriers and agents, and inserting of papers as well as supervising newspaper carriers [R. 64-68; 312], and that the Union was interested in organizing employees who did work appertaining to mailing part of the time, and other work not within another union's jurisdiction the rest of the time. [R. 14-15; 191-192.] These findings were made in spite of the fact that the Union organizer testified that the Union was not interested in organizing Respondent's district managers. The Trial Examiner did not credit the organizer's testimony. [R. 14-15.]

After David left the Company on December 21, 1959, he immediately went to work as a journeyman mailer at approximately double the hourly rate of pay he had earned while working for Respondent. [R. 13.]

Thus, the Trial Examiner made evidentiary findings that Respondent's conduct in the instant case consisted of offering David a new and better position with Respondent which was a type of position which David had been trying to obtain with Respondent, and in which new position he would have still been performing work within the jurisdiction of the Union with the understanding that he could not keep his former job if he did not take the new position. The Trial Examiner further found that David decided not to take the job because he wanted employment elsewhere, which employment the Union had promised him and he therefore left Respondent's employ. These findings were adopted by the Board.

The Trial Examiner also found that Respondent's conduct was motivated by a desire to delay Union organization. [R. 17.] Respondent contends that such finding is not supported by the record considered as a whole. (See Argument, Point IV.) However, regardless of that finding, the Trial Examiner found that Respondent had not engaged in any unfair labor practices because Respondent's conduct was not discriminatory and did not have the effect of encouraging or discouraging membership in a labor organization. The Board, accepting all the factual findings of

the Examiner, nevertheless held that the Act was violated because the Respondent's acts were motivated by a desire to delay union organization, regardless of their effect.

The Questions Involved.

Question No. 1: Did Respondent's conduct violate Sections 8(a)(1) and (3) of the Act where such conduct did not in fact tend to discourage or encourage membership in any labor organization and did not interfere with, restrain or coerce its employees in the exercise of their rights granted in Section 7 of the Act?

Question No. 2: Was Respondent's conduct discriminatory within the meaning of Section 8(a)(3) of the Act where such conduct did not adversely affect any term or condition of employment of Respondent's employees?

Question No. 3: Did Respondent's conduct in questioning one of its employees about his Union membership violate Section 8(a)(1) of the Act, particularly in view of the fact that Respondent was not charged with such conduct in the complaint herein.

Question No. 4: Even if the Respondent's motivation for its conduct is relevant and material, which Respondent contends it is not, does the record considered as a whole support the finding that Respondent's conduct was motivated by an intent to delay Union organization?

ARGUMENT.

I.

Respondent Did Not Violate Sections 8(a)(1) and (3) of the Act Because Its Conduct Did Not Tend to Discourage or Encourage Membership in a Labor Organization and Did Not Interfere With, Restrain or Coerce Its Employees in the Exercise of Their Rights Granted in Section 7 of the Act.

Section 8(a) of the Act states that "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." In the leading case of *National Labor Relations Board v. Kaiser Aluminum & Chemical Corp.,* 217 F. 2d 366 (9th Cir. 1954), this Court set forth the elements which the General Counsel must prove to establish a violation of Section 8(a)(3) of the Act. At page 368 it stated as follows:

> "Substantial evidence must have been adduced (1) to show the employer knew the employee was engaging in a protected activity, (2) to show that the employee was discharged because he had engaged in protected activity, and (3) *to show the discharge had the effect of encouraging or discouraging membership in a labor organization.*" (Emphasis added.)

In *Intermountain Equipment Co. v. National Labor Relations Board,* 239 F. 2d 480 (9th Cir. 1956), this Court reiterated its rule in the *Kaiser* case and stated at page 483 as follows:

> "It should be noted that under the statute mere discrimination among employees is not an unfair

labor practice; it is only where the discrimination encourages or discourages union membership that an unfair labor practice occurs."

It is clear from cases decided by this Court that in order to establish a violation of Section 8(a)(3), the General Counsel must prove that the conduct in fact tended to discourage or encourage membership in a labor organization. This rule has been followed by other courts. *National Labor Relations Board v. W. L. Rives Company,* 288 F. 2d 511 (5th Cir. 1961); *National Labor Relations Board v. Ford Radio & Mica Corp.,* 258 F. 2d 457, 461 (2nd Cir., 1958); *National Labor Realtions Board v. Adkins Transfer Co.,* 226 F. 2d 324, 327 (6th Cir. 1955); *National Labor Relations Board v. J. I. Case Co.,* 198 F. 2d 919, 923 (8th Cir. 1952).

In *National Labor Relations Board v. Adkins Transfer Co., supra,* the court stated at page 327 as follows:

> "We are of the view that the trial examiner was right and the Board was wrong in its decision and order. Only such discrimination as encourages or discourages membership in a labor organization is proscribed by the Act. Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. National Labor Relations Board, 347 U. S. 17, 74 S. Ct. 323, 98 L. Ed. 455. *In order to establish an 8(a) (3) violation, there must be evidence that the employer's act encouraged or discouraged union membership.* The section requires that *the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership,* and to make out a

> case, it must appear that the employer has, by discrimination, encouraged or discouraged membership in a labor organization." (Emphasis added.)

In *National Labor Relations Board v. J. I. Case Co., supra,* the court stated at page 923 as follows:

> "The test which must be applied to the situation is one which we have only recently emphasized —'There can be no violation of (section 8(a)(3)) unless *the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization.*' [Citing case] And that proximate and predictable effect, as a basis for a finding of violation, must have at least some evidentiary foundation in probative circumstances or testimony." (Emphasis added.)

The Board has recognized that in order to find a violation of Section 8(a)(3) it must find that the conduct *tends* to discourage membership in a labor organization. This rule was succinctly stated in 23 N. L. R. B. Annual Reports (1958), page 64, as follows:

> "Section 8(a)(3) forbids any discrimination in employment which tends 'to encourage or discourage membership in any labor organization.'"

These decisions of the courts are consistent with the intent of Congress. In the House Report on Section 8(a)(3) it is stated that this section outlawed discrimination "which tends to 'encourage or discourage membership in any labor organization.'" (H. R. Report No. 1147, 47th Congress, First Session, p. 21.)

Just as to violate Section 8(a)(3) of the Act the conduct must tend to discourage membership in a labor organization, to violate Section 8(a)(1) the conduct must tend to interfere with the exercise of rights under Section 7 of the Act. The rule was stated in *National Labor Relations Board v. Illinois Tool Works,* 153 F. 2d 811, 814 (7th Cir. 1946) as follows:

> "In answer to these contentions it will be enough to say that this court, National Labor Relations Board v. Burry Biscuit Corp., 7 Cir., 123 F. 2d 540, has recognized that the test of interference, restraint and coercion under §8(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. Western Cartridge Co. v. National Labor Relations Board, 7 Cir., 134 F. 2d 240, and Rapid Roller Co. v. National Labor Relations Board, 7 Cir., 126 F. 2d 452. *The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.*" (Emphasis added.)

It is true that it is not necessary for the record to contain specific evidence that the conduct tended to discourage membership in a labor organization or tended to interfere with the exercise of rights under Section 7 of the Act. It is sufficient if the Board can infer that such discouragement or encouragement of membership in a labor organization or interference with the exercise of rights under Section 7 of the Act is a natural and foreseeable consequence of the conduct. *Radio Officers' Union v. National Labor Relations Board*, 347 U. S. 17, 52 (1954). However, this Court has held that the Board cannot create such inferences

where there is no substantial evidence upon which the inferences may be based. In *National Labor Relations Board v. Kaiser Aluminum & Chemical Corp.,* 217 F. 2d 366 (9th Cir. 1954), this Court stated at page 368 as follows:

> "Although the Board is entitled to draw reasonable inferences from the evidence, it cannot create inferences where there is no substantial evidence upon which these may be based."

The United States Supreme Court has held that inferences must not be arbitrary but must have ". . . a reasonable relation to the circumstances of life as we know them. . . ." *Tot v. United States,* 319 U. S. 463, 467-468 (1943).

In *National Labor Relations Board v. W. L. Rives Company,* 288 F. 2d 511 (5th Cir. 1961), a case closely analogous to the instant case, the court held that it must determine whether from the facts it could infer that encouragement of membership in a labor organization was a foreseeable consequence of Rives' conduct. In that case the Rives Company was charged with refusing to reinstate alleged unfair labor practice strikers in violation of Section 8(a)(1) and (3) of the Act. The evidence established that Rives took work away from its employees who were members of the Sheet Metal Workers Union and subcontracted such work to an employer who employed members of the Pipe Fitters Union, after being threatened with a boycott of its products at a construction site by members of the Pipe Fitters Union. At the time this was done Rives assured its employees that this subcontracting would not affect anyone's job and pay and that work would not be reduced. Since then Rives' employees received their

regular full pay. Nevertheless, the employees became restive over the subcontracting and went out on strike. When the strike was concluded all strikers were rehired except six, which Rives treated as economic strikers who had been replaced. The Board held them to be unfair labor practice strikers and ordered their reinstatement because Rives' conduct in withdrawing work from its employees constituted an unfair labor practice. The Board contended, as it does before this Court, that discouragement of union membership was a natural and foreseeable consequence of Rives' conduct. The court disregarded this contention and held that there was no proof that the employer's conduct encouraged or discouraged union membership. The court stated at page 516 as follows:

> "But the essence of any objective test and inquiry into what the 'foreseeable consequences' of an act may be is the probable impact in the light of existing conditions. Conduct likely to encourage or discourage union activity in one surrounding might have quite a different consequence in another environment. The test does not seek the law's answer to some hypothetical problem. The answer, as the problem, would thus be academic only. The law takes the parties as it finds them. Against that background is the question then propounded: *in all reasonable likelihood would this specified conduct encourage* [*or discourage*] *union membership?*" (Emphasis added.)

The Board may attempt to distinguish this case on the ground that the Board had found that Rives "was not actuated by a desire to discriminate against its employees or by an antiunion animus." This distinction

is without merit. The court recognized the rule of *Radio Officers' Union v. National Labor Relations Board,* 347 U. S. 17 (1954), that proof of specific intent to discriminate or to discourage or encourage membership in a labor organization was unnecessary, where in fact the act does encourage or discourage such membership. The court realized that the lack of such intent was not an automatic insulation. It is well established that pressure by one union in order to compel an employer against its will to discriminate in favor of that union and against another union does not excuse the employer when the conduct is in fact discriminatory and has the effect of encouraging membership in a labor organization. *National Labor Relations Board v. Star Publishing Co.,* 97 F. 2d 465 (9th Cir. 1938); *National Labor Relations Board v. Gluck Brewing Co.,* 144 F. 2d 847 (8th Cir. 1944). The court, in *Rives,* did not overrule those cases but it recognized the validity of those cases and cited them at page 515 and then distinguished them from the *Rives* case. The *Rives* case is a square holding that in order to find a violation of Sections 8(a)(1) and (3) the conduct must have the effect of discouraging or encouraging membership in a labor organization.

In the instant case the Trial Examiner found that the conduct of Respondent did not in any way inhibit union organization. [R. 19.] The Board stated in its Decision that it disagreed with the Trial Examiner's theory, but did not state from what evidence it inferred that the Respondent's conduct tended to discourage or encourage membership in a labor organization. [R. 21.] In its brief before this Court the Board states at page 11 that "It is manifest that discouragement of union membership was a 'natural and foreseeable consequence'

of the method resorted to by Respondent to rid itself of the threat of unionization." The Board's brief does not explain this statement and does not recite the evidence from which it infers that it is manifest from the facts of this case that discouragement of membership in a labor organization was a natural and foreseeable consequence.

The conduct of Respondent consisted of offering David Clark a better position than he then had, which was a type of position which David had been attempting to obtain with Respondent, and in which new position he would still be performing work which the Trial Commission held was within the jurisdiction of the Union and within any prospective bargaining unit, with the understanding that he could not keep his former job. The Trial Examiner found that this offer of a trainee position did not cause David Clark to leave his employment with Respondent. [R. 16-17.] He found that David declined the offer and consequently left his employment with Respondent, because thereby he would be enabled to obtain a much better job in Los Angeles. [R. 13, 14.] The Board adopted each of these findings. The Board concluded from Respondent's conduct that it discharged David. Such a conclusion would be warranted only if the offer of a trainee position itself caused David, who sought this type of position, to leave his employment with Respondent. An inference that such offer caused David to leave his employment and thus discouraged membership in a labor organization would be directly contrary to the finding of the Trial Examiner. It also would be arbitrary and unreasonable because such an inference would not have a reasonable relation to the circumstances of life. The transfer to

a better position would not cause a person to leave his employment and would not discourage union membership, particularly where the new position was of a type which the person had been trying to obtain. The transfer to another position within the Union's described jurisdiction would not cause a person to leave his employment. It is not a normal circumstance of life for the compulsory transfer from one job to another job within the union's jurisdiction to cause one to leave his employment or for it to discourage membership in a labor organization if the new job is better in every respect than the old job and is a job which the person had been trying to obtain. Respondent's conduct did not constitute a discharge of David and did not discourage membership in a labor organization.

The Board states that by its conduct Respondent "rid itself of the threat of unionization." This is not correct. David would still be employed by Respondent and would still be able to be represented by a union but for his voluntary decision to leave. The Examiner so found; the Board adopted his findings. Collins offered David the new position on December 19, 1959, on December 21, 1959, and again on December 22, 1959. Collins did not want David to leave. In fact, Collins assumed David would take the new position and paid him at the new rate for December 19th and 21st. However, David decided to take advantage of the Union's offer to obtain for him a much better job in Los Angeles, provided he was discharged by Respondent. He convinced the Union (contrary to what he knew and what the Trial Examiner and Board found) that the trainee position was more undesirable than the fly boy job, that he was justified in turning it down,

and that consequently he had been wrongfully discharged. By these methods he was able to obtain this better employment in Los Angeles. If the threat of unionization was removed, it was done so by David and the Union and not by Respondent.

The Board in its brief further states at page 4 that the effect of David's taking the trainee position would have been to remove him from the mailroom group. This statement is not correct. In the trainee position David would still have been working in the mailroom with the other mailroom employees. In fact, the Trial Examiner found and the Board adopted the finding that the trainee position was not outside of the jurisdiction of the Union but was within its jurisdiction.

Respondent did not violate Sections 8(a)(1) and (3) of the Act because its conduct did not tend to discourage or encourage membership in any labor organization or did not interfere with, restrain or coerce its employees in the exercise of their rights granted under Section 7 of the Act.

II.

Respondent Did Not Violate Section 8(a)(3) of the Act Because Its Conduct Was Not Discriminatory.

In order for conduct to be discriminatory within the meaning of Section 8(a)(3) of the Act the conduct must be such as to adversely affect the employees. *National Labor Relations Board v. W. L. Rives Company*, 288 F. 2d 511 (5th Cir. 1961).

In its Decision in the instant case the Board adopted the rule that changes in the terms and conditions of employment based upon the fact or absence of union

membership are discriminatory within the meaning of the Act. In support of this rule the Board cited two of its own recent decisions, *W. L. Rives Company,* 125 N. L. R. B. 772, and *Combined Century Theatres,* 123 N. L. R. B. 1759. [R. 21.]

Orders based upon this rule have not been enforced unless the change in the terms and conditions of employment had an adverse effect upon the employees. The Board's order in the *Rives* case was not enforced by the Court of Appeals for the Fifth Circuit. That court held that Rives' conduct did not have the effect of encouraging or discouraging membership in a labor organization. It also held that the conduct was not discriminatory because it did not adversely affect the employees. The court stated at pages 515-516 as follows:

> "But here there was nothing done or intended which in any way disparaged the employees either singly or as a group. Their pay remained exactly as it had. They were given full work with no reduction either in hours worked or the applicable pay scale. The only difference was that step (2) operations on material destined for Bowater was now performed by the independent contractor Jamison. Rives' men did step (1) work on this and all other jobs exactly as they had in the past. They performed step (2) work on all jobs other than Bowater. When they were not busy with this work, other tasks were found. These were of the kind to which the men were occasionally assigned in the past. None of this work was menial or in any sense degrading, likely to embarrass or humiliate any of the men in the eyes of fellow workers."

The Board's order in the *Century Theatres* case was enforced in part by the Court of Appeals for the Second Circuit, 278 F. 2d 306 (1960). In that case it was proved that one employee was terminated because he was not a member of the union in order to make room for an employee who was a member of the union. That case is clearly distinguishable from the instant case. There was no question but what that conduct had both the effect of encouraging union membership and of adversely affecting the employee. However, the court refused to order reinstatement of the employee because within a few days after his first termination he was re-employed and was later terminated for just cause. The court did enforce the part of the order ordering back pay for the period between the employee's first termination and his second employment.

The Board in its brief at pages 10-11 cites several cases in support of its contention that any change in the terms and conditions of employment based upon the fact or absence of union membership is discriminatory. However, in each of those cases the employees were detrimentally affected in some way by the conduct. In *Olin Matheson Chemical Corp. v. National Labor Relations Board,* 232 F. 2d 158 (4th Cir. 1956), the employer's conduct consisted of reducing seniority status of some employees which, of course, had a potential detrimental effect on such employees. In *National Labor Relations Board v. Star Publishing Co.,* 97 F. 2d 465 (9th Cir. 1938), and in *National Labor Relations Board v. Gluek Brewing Co.,* 144 F. 2d 847 (8th Cir. 1944), the employer transferred employees to temporary jobs with limited duration. It

was clear that the conduct had a detrimental effect on such employees because their job security was impaired. In *National Labor Relations Board v. Star Publishing Co., supra,* the court stated at page 470: "Respondent makes no contention that the transfer of the men in question was not such a discrimination." In *National Labor Relations Board v. Fairmont Creamery Co.,* 143 F. 2d 668 (10th Cir. 1944), and in *Continental Oil Co. v. National Labor Relations Board,* 113 F. 2d 473 (10th Cir. 1940), the employer transferred employees to other jobs which were unquestionably less desirable.

In *National Labor Relations Board v. W. L. Rives Company, supra,* most of the cases now relied upon by the Board were cited to the court. That court distinguished those cases and stated at page 515 as follows:

> "We are of a like view that there is no support for the conclusion that this conduct constituted a 'discrimination in regard to * * * employment * * * to encourage or discourage membership in any labor organization' under §8(a)(3). In the peculiar setting of this case we think the element of discriminatory practice in regard to 'hire or tenure of employment or any term or condition of employment * * *' was lacking. Of course in assaying this, we are mindful that it is something more than a simple question of money wages as such. N. L. R. B. v. Waterman Steamship Corp., 1940, 309 U. S. 206, at page 218, 60 S. Ct. 493, 84 L. Ed. 704. Other things such as seniority, Olin Matheson Chemical Corp. v. N. L. R. B., 4 Cir., 1956, 232 F. 2d 158, or trans-

fers, Continental Oil Co. v. N. L. R. B., 10 Cir., 1940, 113 F. 2d 473, 484, are important, sometime decisively so.[7]"

The Court's footnote was as follows:

"[7]See also N.L.R.B. v. Star Publishing Co., 9 Cir., 1938, 97 F. 2d 465; N.L.R.B. v. Gluek Brewing Co., 8 Cir., 1944, 144 F. 2d 847; South Atlantic SS Co. v. N.L.R.B., 5 Cir., 1941, 116 F. 2d 480, certiorari denied, 313 U.S. 582, 61 S. Ct. 1101, 85 L. Ed. 1538."

The Board in its brief at pages 9-10 contends that the term "discriminate" does not comprehend a change in the employment relationship which is detrimental to the employee affected. It relies upon a dictionary definition of the word "discriminate" to the effect that the word means "to serve to distinguish; to make as different, to differentiate." However, the Act does not state that it is an unfair labor practice "to discriminate". Section 8(a)(3) states that it shall be an unfair labor practice for an employer "by discrimination" in regard to hire or tenure of employment to encourage or discourage membership in a labor organization. By standard definition the word "discrimination" means "a distinction in treatment, esp., an unfair or injurious distinction." *Webster's New International Dictionary,* Second Edition, Unabridged. Thus, far from supporting the Board's rule, the standard definition of the word "discrimination" supports Respondent's contention and the Trial Examiner's theory that in order for an employer to commit an unfair labor practice "by discrimination" the conduct must not only be different but it must also have an injurious or adverse effect.

In the instant case Respondent's offer of the trainee position, a kind of job which David and his father had

been trying to obtain for some time, was not discriminatory because it was a better job at increased pay. [R. 15, 18.] This is not a case where the employee was transferred against his will. David had been trying to get this kind of a position with Respondent. David did not refuse this position because he did not want it; he refused the position because he wanted to obtain a still better one with more pay and less hours which the Union had promised him if he left his job with Respondent through no fault of his own.

The Board in its brief at page 9 states in a footnote that there is no question of course that an offer of a better position to an employee as an inducement to abandon union activity violates Section 8(a)(1) of the Act. If the Board is suggesting that in the instant case Respondent has been charged with such conduct or that such conduct is prohibited by its Order which it seeks to have enforced, it is clearly wrong. The complaint herein does not charge Respondent with offering David a better position as an inducement to abandon his Union activity. In fact, at the hearing before the Trial Examiner and in its briefs, the General Counsel maintained that the trainee position was a worse position than David's old job. Furthermore, the Board's order does not purport to prohibit offering a better position as an inducement to abandon Union activity. The cases cited by the Board to the effect that the offer of a better job as an inducement to abandon union activity violates Section 8(a)(1) of the Act are completely irrelevant and immaterial to a decision of the instant case.

The court in *National Labor Relations Board v. W. L. Rives Company,* 288 F. 2d 511 (5th Cir. 1961),

appropriately stated the law applicable in the instant case when it stated at page 516 as follows:

> "Whatever doubt there might be on this score when 'discrimination' is viewed as a single element, there can be none when viewed, as the statute does, by coupling discrimination with the prohibited effect to 'encourage or discourage membership in any labor organization.' "

It is clear that Respondent's conduct in this case was not violative of Section 8(a)(1) and (3) of the Act because it was not discriminatory and did not tend to encourage or discourage membership in a labor organization.

III.

Respondent Did Not Violate Section 8(a)(1) of the Act by Questioning an Employee About His Union Membership.

It is well settled that the mere questioning of employees without expressly or impliedly threatening or promising benefits is not an unfair labor practice. *National Labor Relations Board v. Fullerton Publishing Company,* 283 F. 2d 545 (9th Cir. 1960); *National Labor Relations Board v. McCatron,* 216 F. 2d 212 (9th Cir. 1954, certiorari denied, 348 U. S. 943, 1955). In *National Labor Relations Board v. McCatron, supra,* this Court stated at page 216 as follows:

> "Interrogation regarding union activity does not in and of itself violate §8(a)(1). This holding may be at variance with that of the Board as expressed in Standard-Coosa-Thatcher Co., 1949, 85 N. L. R. B. 1358. We are of the opinion that in order to violate §8(a)(1) such interrogation must

> either contain an express or implied threat or promise, or form part of an overall pattern whose tendency is to restrain or coerce. We so held in Wayside Press, Inc. v. N. L. R. B., 9 Cir., 1953, 206 F. 2d 862. Other circuits have taken the same view. N. L. R. B. v. Associated Dry Goods Corp., 2 Cir., 1954, 209 F. 2d 593; N. L. R. B. v. Syracuse Color Press, Inc., 2 Cir., 1954, 209 F. 2d 596; N. L. R. B. v. Montgomery Ward & Co., 2 Cir., 1951, 192 F. 2d 160; N. L. R. B. v. Superior Co., 6 Cir., 1952, 199 F. 2d 39, 43; Sax v. N. L. R. B., 7 Cir., 1948, 171 F. 2d 769; N. L. R. B. v. Arthur Winer, Inc., 7 Cir., 1952, 194 F. 2d 370; N. L. R. B. v. England Bros., Inc., 1 Cir., 1953, 201 F. 2d 395."

In the instant case the only questioning was as to whether David had been contacted by the Union or was a member of the Union. This questioning certainly does not contain an actual or implied threat or promise and is, therefore, not violative of Section 8(a)(1).

Moreover, in the instant case, the complaint does not allege that Respondent violated Section 8(a)(1) by the questioning of its employees. Such issue was not tried by the Trial Examiner. He stated at the commencement of his Intermediate Report: "The question presented is whether one David Clark's termination from Respondent's employ was a violation of Section 8(a)(3) of the Act." The first time in the instant case that Respondent knew that the question of employee interrogation as a violation was involved was when the Board issued its Decision and Order requiring it to cease and desist from such interrogation. An order of an administrative agency is invalid where it

is made without giving the opposing party notice that such an order might be made and without giving it the opportunity to oppose such order. The conduct of the agency under such circumstances violates judicial tradition embodying the basic concepts of fair play. *Morgan v. United States,* 304 U. S. 1, 18-22 (1938).

The conduct of the employer in questioning its employee did not violate Section 8(a)(1) of the Act.

IV.

Respondent's Conduct Was Not Motivated by an Intent to Discourage Membership in the Union or to Interfere With, Restrain or Coerce Employees in the Exercise of the Rights Granted Under Section 7 of the Act.

The Trial Examiner held that regardless of the reasons for Respondent's conduct, the conduct did not violate Sections 8(a)(1) and (3) of the Act because it was not discriminatory and did not have the effect of encouraging or discouraging membership in a labor organization. Respondent contends that the reasons for Respondent's conduct are immaterial to a decision of the instant case.

However, the Trial Examiner went on to find that Collins offered David a better position based on the mistaken belief that it might prevent David from being represented by the Union in Respondent's mailroom. Respondent has excepted to that finding and to related findings. Respondent contends that the findings which it has excepted to, and the related findings, while irrelevant and immaterial to a decision of the instant case, are clearly erroneous and not supported by the record considered as a whole.

The Board cannot conclude that Respondent violated Sections 8(a)(1) and (3) of the Act in any event without proving by a preponderance of the evidence that the Respondent's conduct was motivated by an intent to discourage Union membership or other protected activity. The rule was stated by Mr. Justice Reed in *Radio Officers' Union v. National Labor Relations Board,* 347 U. S. 17 (1954) at pages 43-44 as follows:

> "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both §8(a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, *Labor Board v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, in which we upheld the constitutionality of §8(3), we said with respect to limitations placed upon employers' right to discharge by that section that 'the [employer's] true purpose is the subject of investigation with full opportunity to show the facts.' Id., at 46. In another case the same day we found the employer's 'real motive' to be decisive and stated that 'the Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees.' Courts of Appeals have uniformly applied this criteria, and writers in the field of labor law emphasize the importance of the employer's motivation to a finding of violation of this section. Moreover, the National Labor Relations Board in its annual reports regularly reiterates this requirement in its discussion of §8(a)(3). For example, a recent report states that 'upon scrutiny of all the facts in a particular case, the Board must de-

termine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute.' "

The conduct of the Respondent in offering the trainee position to David Clark and in advising him that he could not keep his fly boy job if he refused the trainee position was motivated by the need to establish the trainee program and by economic considerations and not by a desire to discourage membership in the Union or to interfere with its employees' rights under Section 7. The undisputed evidence established the following facts which Respondent contends prove that Respondent was not motivated by a desire to discourage union membership: During the fall of 1959 the operation of the circulation department was made difficult by reason of the constant turnover of district managers. [R. 69, 265.] Trained employees were required to neglect the proper performance of their duties in the circulation department in order to do the work of employees who had quit. [R. 266, 267.] During this period it occurred to Collins that a possible solution would be to have an extra man available who would know all of the inside and outside duties of all district managers so that he could fill in when a regular district manager quit or was unavailable. This extra man could either be a permanent replacement or a temporary replacement until a new man could be trained. [R. 272, 273, 299, 300.]

However, Collins hesitated to request approval of his idea because of the fact that it involved hiring an extra man. [R. 272.] In December, 1959, Collins had great difficulty in replacing one of his district man-

agers. [R. 275.] This event emphasized the need for the extra man who would know the outside and inside duties of all district managers. [R. 275.] Several other departments of the Company had extra men who were classified as trainees and Collins had previously considered requesting such a trainee program. [R. 272.] If a trainee program were established in the circulation department he would be able to have available an extra employee who was familiar with all of the duties of the circulation department employees and who was able to either permanently or temporarily fill in when a district manager quit or was unavailable. Collins and Mr. Curry had previously discussed such a possibility.

On or about December 15, 1959 Collins approached Mr. Curry and requested and obtained approval to hire an extra man as a trainee in the circulation department. [R. 272, 275-276.] It was decided that the pay would be $1.67 per hour. [R. 277, 302.] It was decided that the first step in the program would be the fly boy job because the inside duties of the district managers were so closely related to the duties of the fly boy that to first know the duties of the fly boy would be of assistance in learning the inside duties of a district manager and the mailroom procedures, and because on occasion it was necessary for a district manager to actually relieve the fly boy and perform his work. [R. 273.] All of the district managers knew and could perform the duties of the fly boy job. [R. 273.] It was decided that David Clark should be the trainee district manager, the second step in the program because he knew the fly boy job and the inside duties of the district managers and therefore could immediately commence learning their outside

duties and performing their inside duties; because he had been a good employee and deserved the promotion; because he wanted a job with shorter hours; and because he would gain experience in dealing with people which would help him in the future. [R. 278-279.]

Collins assumed that David would take the new position because of his prior conversations with him, because he had assisted the district managers in their outside duties, and because it was a promotion. [R. 302.] It was decided to make the new position effective December 19, the beginning of the next pay period. [R. 302.] Collins normally did not advise his employees that they are getting a raise or are being promoted until the day on which the raise was effective. [R. 302.] In this case the raise was effective on December 19, 1959, and that was the day on which Collins advised David that he wanted him to take the trainee position.

On December 19, 1959 Collins offered David the trainee position. [R. 74-75, 279-280.] Collins advised David that because of the fact that he wanted to start the trainee program and build a series of trainees, and because of the fact that the first step in the program was the job of fly boy, if David didn't take the new position as trainee he would have to hire another trainee and start him in the fly boy job. [R. 43-44.] David and his father stated that he could not take it. [R. 114-115, 126-129, 139-140, 283.] On December 21, 1959 David was again asked to take the position and David stated he *would not* take the position; whereupon David left his employment with Respondent. [R. 85.]

On December 22, 1959, when David returned to pick up his check, he was asked if he had changed his mind and David replied "No." [R. 49.] David was very happy and friendly [R. 99], and when asked at the hearing the following question: "You weren't mad at Mr. Collins?", answered "Oh, no. What was there to be mad about." [R. 99.] Shortly after December 21, 1959 a new trainee was employed under the same terms and conditions as had been offered to David. [R. 291.] At the time of the hearing he was still learning the fly boy job and the inside duties of the district managers, but had gone out with some of the district managers on various occasions. [R. 306, 309.] Collins contemplated that in the near future the present fly boy would move up to the next step in the trainee program, which was the position offered to David, and that Collins would then employ a new trainee to commence as fly boy. [R. 312.] The actions of Respondent were motivated by the needs of the operation and by economic considerations and not by a desire to discourage membership in the Union or to interfere with the employees' rights.

Moreover, there was no evidence that the trainee position was one outside of the jurisdiction of the Union. In the new job David would continue performing duties in the mailroom as well as duties elsewhere. In fact, the Trial Examiner found that the trainee position was not outside of the jurisdiction of the Union but was within its jurisdiction. It is essential to a finding of illegal motivation in the instant case that it be proved by a preponderance of the evidence that the new position was outside of the Union's jurisdiction. The Trial Examiner recognized the necessity of such a find-

ing. This is illustrated by the following statements of the Trial Examiner during the course of the hearing just before the close of the General Counsel's case:

> "Implicit in this record, probably, is the question of union jurisdiction.
>
> "Mr. Clark here, has been a member of the ITU for a long time, and unless you are going to develop it, I was going to find out whether he knew what the practice in this area is with respect to what type of work the mailers' division of the ITU includes.
>
> "Mr. Mark: No. That particular point I wasn't going to go into.
>
> "Trial Examiner: I beg your pardon.
>
> "Mr. Mark: I hadn't planned on going into that point or to call witnesses on it.
>
> "Trial Examiner: Well, I regard it as essential in making—even to make a prima facie case to ascertain that, the aspect of it; otherwise I don't see how there is any basis for—on the evidence that I have heard so far for finding discriminatory motivation." [R. 146-147.]

However, despite his recognition of the necessity of proving that the trainee position was not one within the jurisdiction of the Union in order to find discriminatory motivation, the Trial Examiner found that Respondent was motivated by an intent to delay Union organization while at the same time finding that the trainee position was one within the jurisdiction of the Union. The finding of such motivation was erroneous and not supported by the record considered as a whole.

The Board relies upon the following factors in support of its finding that the Respondent was moti-

vated by an intent to delay union organization: (1) the "abrupt move" to take David out of the mailroom when there was no one else available to perform the work; (2) the fact that David was not permitted to continue his fly boy job; (3) the fact that Respondent was required temporarily to assign Clark's work to other employees for more than a month; and (4) statements of Collins to the effect that there was no need for a Union and that Respondent's mailroom was not ready for a Union.

The offering to David of the trainee position was not an "abrupt move" to take him out of the mailroom. The creation of a position similar to the trainee position had been discussed by Collins with David and other employees for some time. The reason that it was not put into effect sooner was because it would require the employing of an extra man. However, when they had so much difficulty in hiring someone on December 15th to replace a district manager, Collins felt that that difficulty was sufficient to enable him to convince the publisher that it would be better for the operation of the paper if another man was employed who would be able to take up the slack when a district manager departed and therefore eliminate some of the confusion surrounding such an event. Furthermore, the trainee position would not have taken David out of the mailroom. He would still have performed duties in the mailroom, such as stacking and tying papers, carrying papers to the dock and loading trucks.

The fact that David was not permitted to continue his fly boy job was adequately explained by Collins. Collins wanted to commence a trainee program. He had persuaded Mr. Curry to start such a program. The

first step in the trainee program was the fly boy job. After an employee knew the fly boy job he would be promoted to the second step in the program, which was the position offered to David. David knew the fly boy job and was thus ready for the trainee position. However, if David did not take the position Collins would have had to employ someone directly to that position without that employee becoming familiar with the mailroom procedures as a fly boy. This Collins did not want to do because he believed that in order to be a successful trainee an employee must first learn the fly boy job and mailroom procedures. Therefore, if David could not take the position Collins had to hire someone in David's fly boy job in order to start the trainee program properly.

There is no evidence to support the Board's finding that Respondent temporarily assigned Clark's work to other employees for over a month. The record is clear that a newspaper carrier by the name of John Rinde was employed in the fly boy position as a trainee at the rate of $1.67 per hour soon after David left. [R. 291.] Collins had already spoken to him about promoting him to this job prior to December 21, 1959. [R. 291.] As soon as Rinde sufficiently learned the duties of fly boy, which was the first step in the trainee program, another trainee was to be hired in his position and Rinde would be promoted to the position which David refused. Moreover, it is clear from the record that David left on December 21 because he wanted to go to work in Los Angeles. In fact he worked in Los Angeles the night of December 21, 1959. It is true that he asked Collins whether Collins wanted him to remain and Collins said that it was not necessary. How-

ever, this was consistent with the desire on the part of Collins to let David, who wanted to depart anyway, depart as soon as possible. There was no animosity between David and Collins; in fact David testified that there was no reason for him to be mad at Collins.

The Board relied upon statements of Collins to the effect that it was his opinion that there was no need for a Union and that the mailroom was not ready for a Union. These are merely statements of opinion. Mere statements of opinion cannot be the sole basis for the finding of an unfair labor practice. In *Press Co. v. National Labor Relations Board,* 118 F. 2d 937 (D. C. Cir. 1940), the court stated at page 942 as follows:

> "One or two other witnesses said the general impression of those on the paper was that Lewis was out of sympathy with the Guild, and this doubtless was true. But giving due weight to the normal and natural effect of his statements, we are nevertheless of opinion that, without more, the Board was not justified in finding that *alone* (emphasis supplied) they constituted an unfair labor practice. *The labor law does not prohibit the right of opinion on the part of the employer, nor the expression of it.* (Citing cases.)" (Emphasis added.)

The burden is on the Board to establish by a preponderance of the evidence that Respondent was motivated by an intent to delay Union organization. This burden is not met merely by introducing evidence which shows no more than a suspicion that Respondent was

so motivated. In the instant case the record considered as a whole does not support a finding that Respondent's conduct was motivated by an intent to delay Union organization.

Conclusion.

For the reasons stated above it is submitted that the Board has not proved by a preponderance of the evidence that the Respondent has violated Section 8(a)(1) or 8(a)(3) of the Act and that its petition for enforcement of its order be denied.

Dated: October 12, 1961.

Respectfully submitted,

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